Malaysian Debt Ventures Bhd v FLH ICT Services Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22A-1043–08 OF 2012
ASMABI MOHAMAD JC
28 JUNE 2013

Banking — Banks and banking business — Banking facility — Islamic financing — Bai' al-inah contract — Asset sale agreement and asset purchase agreement — Whether must stand alone and not tied to one another — Whether must be concluded at different times — Whether bai' al-inah contract in compliance with Shariah principle of financing

Civil Procedure — Summary judgment — Application for — Financing facility — Shariah financing — Bai' al-inah — Recovery of money due and payable — Uncertainty of asset used in transaction — Whether transaction Shariah non-compliant — Whether transaction contrary to the spirit and intent of financing concept based on bai' al-inah — Whether defendant had raised triable issues — Whether plaintiff entitled to summary judgment — Whether straightforward and proper case to be disposed of by way of summary judgment — Rules of Court 2012 O 14

This was a claim by the plaintiff against the defendants for the recovery of the sum of money which was due and payable under the financing facility granted by the plaintiff to the first defendant premised on the Shariah principle of financing known as *bai' al-inah*. By a notice of application, the applicant/plaintiff sought for a summary judgment to be entered against the respondents/defendants pursuant to O 14 of the Rules of Court 2012. In their attempt to resist the plaintiff's application, the defendants raised the following issues, inter alia, that the plaintiff did not have the capacity to carry out the business involving financial transaction premised on the Shariah principle of financing as it is not mandated by its memorandum and articles of association; the so called Shariah contract which was allegedly based on the *bai' al-inah* principle of financing entered into between the plaintiff and the defendants was Shariah non-compliant and contrary to the spirit and intent of the financing concept based on *bai' al-inah*. The issues for the determination of this court was whether the plaintiff was entitled to summary judgment as prayed in encl 6 or whether the defendants had satisfied this court on affidavit evidence that the defence had not only raised an issue but also the said issue was triable.

Held, dismissing the plaintiff's application with costs of RM5,000:

(1) The *bai' al-inah* contract shall consist of two clear and separate contracts

termed as the asset sale agreement ('ASA') and the asset purchase agreement ('APA') respectively, with no express provision or condition in the contract to repurchase the asset. The ASA and APA must stand alone and not tied to one another. Both the ASA and the APA must be concluded at different times which mean that the ASA shall be completely executed before the conclusion of the APA. There must also be a transfer of ownership of the asset and a valid possession of the asset in accordance with the Shariah and current business practice. However, in this case the ASA and the APA did not stipulate the subject matter of the transactions. The ASA and the APA made no mention of the subject matter of the transaction and/or to be precise, these two agreements did not specify the asset that was transacted by the plaintiff and the first defendant for the purpose of the contract (see para 18).

(2) The plaintiff's documents to claim for summary judgment to be entered against the defendants were some kind of a 'treasure hunt' with no treasure to be found. The plaintiff invited the court to move from one document to the other and/or to move in circle with no certainty as to what was the 'asset' that both parties had in mind at the time of the execution of all the relevant documents. It would appear that there was uncertainty of the asset used in the transaction. None of the documents made reference to a particular asset for the purpose of the ASA and the APA. Certainty is a basic requisite in any contract. What amounts to certainty is a question of fact which could not be determined by way of a summary judgment (see paras 21–22).

[Bahasa Malaysia summary

Ini adalah tuntutan oleh plaintif terhadap defendan-defendan untuk mendapat kembali jumlah wang yang terhutang dan mesti dibayar di bawah kemudahan kewangan yang diberikan oleh plaintif kepada defendan pertama berdasarkan prinsip Syariah yang dikenali sebagai *bai' al-inah*. Melalui notis permohonan, pemohon/plaintif memohon untuk penghakiman terus dimasukkan terhadap responden-responden/defendan-defendan berikutan A 14 Kaedah-Kaedah Mahkamah 2012. Dalam percubaan mereka untuk menahan permohonan plaintif, defendan-defendan membangkitkan isu-isu, antara lain, bahawa plaintif tidak mempunyai kapasiti untuk menjalankan perniagaan yang melibatkan transaksi berdasarkan prinsip kewangan Syariah kerana ia tidak dimandatkan oleh memorandum dan artikel pertubuhan; kontrak Syariah yang diperkatakan yang mana didakwa berdasarkan prinsip kewangan *bai' al-inah* yang dimasuki antara plaintif dan defendan-defendan bukan mematuhi Syariah dan bertentangan semangat dan niat konsep kewangan berdasarkan *bai' al-inah*. Isu-isu untuk penentuan mahkamah ini adalah sama ada plaintif berhak kepada penghakiman terus seperti yang dipohon dalam lampiran 6 atau sama ada defendan-defendan memuaskan hati

mahkamah ini atas keterangan afidavit bahawa pembelaan bukan sahaja membangkitkan isu tetapi isu tersebut juga adalah boleh dibicarakan.

Diputuskan, menolak permohonan plaintif dengan kos sebanyak RM5,000:

(1) Kontrak *bai' al-inah* mengandungi dua kontrak yang jelas dan berasingan yang ditermakan masing-masing sebagai perjanjian jualan aset ('PJA') dan perjanjian belian aset ('PBA'), tanpa peruntukan atau syarat nyata di dalam kontrak untuk membeli semula aset tersebut. PJA dan PBA mesti berdiri sendiri dan tidak berkait satu sama lain. Kedua-dua PJA dan PBA mesti diputuskan pada masa berlainan yang bermaksud bahawa PJA hendaklah disempurnakan sebelum kesimpulan PBA. Juga mesti terdapat pemindahan milikan asset dan milikan sah aset mengikut Syariah dan amalan perniagaan semasa. Walau bagaimanapun, dalam kes ini PJA dan PBA tidak menyatakan perkara transaksi tersebut. PJA dan PBA tidak menyatakan perkara transaksi dan/atau secara tepatnya, kedua-dua perjanjian ini tidak menyatakan aset yang diurus niaga oleh plaintif dan defendan pertama bagi tujuan kontrak tersebut (lihat perenggan 18).

(2) Dokumen-dokumen plaintif untuk menuntut bagi penghakiman terus terhadap defendan-defendan adalah seperti 'treasure hunt' tanpa harta untuk dijumpai. Plaintif memohon mahkamah untuk menyemak satu dokumen kepada satu lagi dan/atau untuk bertindak dalam ketidakpastian terhadap apakah 'asset' yang kedua-dua pihak fikirkan pada masa pelaksanaan kesemua dokumen yang relevan. Jelas terdapat ketidakpastian aset yang digunakan di dalam transaksi tersebut. Tidak satu pun daripada dokumen-dokumen tersebut membuat rujukan kepada aset tertentu bagi tujuan PJA dan PBA. Kepastian adalah syarat asas dalam mana-mana kontrak. Apa yang pasti adalah soalan fakta yang tidak boleh ditentukan melalui penghakiman terus (lihat perenggan 21–22).]

Notes

For a case on banking facilities, see 1(2) *Mallal's Digest* (4th Ed, 2012 Reissue) para 2365.

For cases on application for summary judgment, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 8443–8501.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400; [1992] 1 CLJ (Rep) 14, SC (refd)

Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282; [1980] 1 LNS 168, FC (refd)

Gunung Bayu Sdn Bhd v Syarikat Pembinaan Perlis Sdn Bhd [1987] 2 MLJ 332; [1987] CLJ (Rep) 120, SC (refd)

Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1994] 1 MLJ 312; [1994] 1 CLJ 328, SC (consd)
Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183; [1987] 2 CLJ Rep 182, SC (refd)
National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300; [1984] 1 CLJ Rep 283, FC (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 s 21(1)
Limitation Act 1953
Moneylenders Act 1951 s 2A(2)
Rules of Court 2012 O 14
Rules of the High Court 1980 O 14, O 14 r 2

Renee Tiun (Jeff Leong, Poon & Wong) for the plaintiff/applicant.
Hj Zainal Azhar Mohamed Zain (Zainal Azhar & Co) for the defendant/respondent.

Asmabi Mohamad JC:

INTRODUCTION

[1] This was a claim by the plaintiff against the defendants for the recovery of the sum of RM12,139,615.23 which was due and payable under the financing facility granted by the plaintiff to the first defendant premised on the Shariah principle of financing known as *bai' al-inah*. By a notice of application dated 28 September 2012 ('encl 6') the applicant/plaintiff ('plaintiff') sought for a summary judgment to be entered against the respondents/defendants ('defendants') pursuant to O14 of the Rules of Court 2012 ('ROC').

[2] Upon perusal of the affidavits and the relevant submissions filed herein and upon hearing learned counsels for the plaintiff and the defendants, on 2 April 2013 this court dismissed encl 6 with cost fixed at RM5,000. The plaintiff being dissatisfied with the said decision appealed to the Court of Appeal Malaysia against the whole of the said decision.

THE APPLICATION

[3] Vide encl 6 the plaintiff sought the following orders:

(a) judgment for the sum of RM12,139,615.23 pursuant to a letter of offer from the plaintiff to the first defendant dated 16 Februari 2009 ('the first LO' — exh MDV1 of encl 5), master facility agreement dated 31 July

2009 ('the facility agreement' — exh MDV2 of encl 5), deed of assignment (Contract Proceeds) dated 31 July 2009 ('the deed' — exh MDV3 of encl 5), asset sale agreement dated 31 July 2009 ('ASA' — exh MDV5 of encl 5), asset purchase agreement dated 31 July 2009 ('APA' — exh MDV5 of encl 5), the debenture dated 31 July 2009 (exh MDV4 of encl 5), the guarantee executed by the second defendant dated 31 July 2009 ('exh MDV6 of encl 5') and supplementary letter of offer dated 18 April 2011 ('second LO' — exh MDV7 of encl 5);

(b) *Ta'widh* at 1%pa or any rate as determined by the plaintiff on the sum of RM12,139,615.23 from 30 June 2011 till realisation;

(c) costs on solicitors-client basis; and

(d) any other relief as deemed necessary by this court.

[4] Other than the writ summons ('writ') and statement of claim ('SOC') dated 2 August 2012, statement of defence dated 8 October 2012, reply and defence and counter claim dated 2 November 2012, the following affidavits were also considered by this court:

(a) the plaintiff's affidavit in support of encl 6 affirmed by Emizura bt Hashim affirmed on 27 September 2012 ('encl 5');

(b) the defendants' affidavit in reply affirmed by Pawanteh bin Mohamed Zain affirmed on 13 February 2013 ('encl 30'); and

(c) the plaintiff's affidavit in reply of Emizura bt Hashim affirmed on 4 March 2013 filed herein ('encl 33').

[5] The grounds for the said encl 6 were as stated in the affidavits of Emizura bt Hashim affirmed on 27 September 2012 ('encl 5') and 4 March 2013 ('encl 33') filed herein. In essence the plaintiff averred that there were no merits in the defendants' defence. Neither could the defendants raise triable issues to merit a full blown trial.

BACKGROUND FACTS

[6] The brief facts leading to the claim can be stated as follows:

(a) pursuant to the first LO (exh MDV1 of encl 5) the plaintiff had granted the first defendant financing facility under the Shariah contract known as *bai' al-inah* up to the limit of RM9,500,000 ('principal sum'). Pursuant to the said contract, the plaintiff agreed to sell its asset to the first defendant for a staggered payment of RM14,233,220 ('sale price') and the plaintiff shall buy the said asset at the purchase price of RM9,500,000 ('purchase price') subject to the terms and conditions contained in the

first LO, the facility agreement, deed of assignment, debenture, ASA and APA all dated 31 July 2009 and the second LO;

(b) the first defendant had agreed to accept the plaintiff's offer subject to the terms and condition contained in first LO, the facility agreement, the deed of assignment, debenture, ASA and APA all dated 31 July 2009 (see p 6 of exh MDV1 of encl 5). The agreed profit rate was at 7%pa calculated on a daily rest, to be calculated twelve months in advance for the first year. The profit for the following years shall be paid quarterly in advance;

(c) the first defendant shall repay the principal sum by way of installment payments with effect from the tenth month from the date of the disbursement pursuant to the Schedule 1 as set out at p 7 of the first LO. The same had been reproduced in the writ and SOC at para 7 and also para 28 of encl 33;

(d) pursuant to a guarantee dated 31 July 2009 executed by the second defendant on 31 July 2008 (exh MDV6 of encl 5), the second defendant had unconditionally and irrevocably guaranteed the due performance of the first defendant's obligations pursuant to the contract entered into as mentioned above. The second defendant had also agreed to pay and settle all sums due and payable by the first defendant to the plaintiff, on demand, subject to the terms and conditions stipulated in the said guarantee. In addition to that the second defendant had also agreed upon demand by the plaintiff to indemnify and keep indemnified the plaintiff all fees, costs, charges, damages, and all liabilities incurred in the course of obtaining and seeking to obtain payment from the defendants;

(e) at the request of the defendants, the payment of the principal sum was subsequently rescheduled with effect from 31 August 2011 to 31 July 2016 (the second LO). One of the salient terms of the second LO, was that, the final amount of RM1,437,851 could only be disbursed once the Data Centre was completed (see item (i) para (c));

(f) despite having been allowed to reschedule its monthly payment, the first defendant had failed and neglected to pay the monthly instalment as agreed in the first and second LO. As a result of the failure on the part of the first defendant to pay the instalment payments, the plaintiff had vide its solicitors Messrs Jeff Leong Poon and Wong caused a notice to recall to be issued to the first and second defendants respectively dated 18 July 2012 (exh MDV8 & 9 of encl 5). Despite a valid demand having been issued to both, the first and second defendants had refused to comply with the said recall notices leaving the plaintiff with no choice but to initiate this writ and SOC against the defendants. According to the plaintiff, the facts in this case were crystal clear and straight forward so as to justify a summary judgment to be entered against the defendants. The

issues raised by the defendants were mere afterthoughts, frivolous and vexatious and were without any merits; and

(g) based on facts deposed in the plaintiff's affidavits and the documents which were exhibited in these affidavits, the plaintiff contended that it had proved to the court that the plaintiff's case is straight forward and unarguable. Hence the plaintiff prayed for order in terms of its application vide encl 6.

ISSUES RAISED BY THE DEFENDANT

[7] In their attempt to resist the plaintiff's application for the prayers sought pursuant to encl 6, amongst others, the defendants raised the following issues:

(a) the plaintiff did not have the capacity to carry out the business involving financial transaction premised on the Shariah principle of financing as it is not mandated by its memorandum and articles of association to do so;

(b) the plaintiff had not been licensed to carry out business premised on the Shariah principle of financing. Therefore the acts of the plaintiff to carry out such business transactions were obviously wrong in law and prohibited. The plaintiff too had not been issued a license by the relevant authority to carry out the business involving financial transaction premised on the Shariah principle;

(c) the so called Shariah contract which was allegedly based on the *bai' al-inah* principle of financing entered into between the plaintiff and the defendants was Shariah non-compliant. Therefore the transaction was null, void and unenforceable.

(d) as had been illustrated in the various documents exhibited in the plaintiff's affidavits for the purpose of encl 6, the contract entered into between the plaintiff and the defendants was Shariah non-compliant and contrary to the spirit and intent of the financing concept based on *bai' al-inah* and was contrary to the terms and conditions sanctioned by the Shariah Advisory Council;

(e) the transactions were tainted with the element of usury which is not permitted within the framework of the Shariah concept of financing;

(f) the plaintiff's action was premature as the repayment term provided by under this contract of financing was seven years which would be expiring only in the year 2016; and

(g) as the whole transactions were Shariah non-compliant, the second defendant who executed the personal guarantee shall not be liable to pay the amount claimed by the plaintiff.

ISSUES RAISED BY THE PLAINTIFF

[8] Learned counsel for the plaintiff raised, amongst others, the following argument:

(a) the defendants had failed to raise any triable issues which merited a full blown trial. Neither did the defendants raise a defence on the merits;

(b) article 3(1) of the plaintiff's memorandum of association authorises the plaintiff to carry out the business of giving loans and/or other financial assistance of any kind whatsoever to any bank, financial institutions and/or persons or body of persons. Article 3(1) of the memorandum of association is wide enough to cover the transaction based on the *bai' al-inah* principle of Islamic financing entered into between the plaintiff and the defendants;

(c) the Central Bank of Malaysia had issued a letter dated 22 July 2002 to acknowledge that the plaintiff had complied with all the requirements of s 21(1) of the Bank and Financial Institution Act 1989 ('BAFIA') and the plaintiff is a licensed Financial Institution, authorised to carry out development financing which is one of the scheduled business provided in the third schedule of BAFIA (see exh PW8 of encl 30);

(d) based on the written confirmation by the Central Bank of Malaysia, the plaintiff was exempted from the provision of the Moneylenders Act 1951 (see Federal Government Gazette PU (B) 219 — exemption under subs 2A(2) of the Moneylenders Act 1951 ('MLA')). Therefore there was no requirement for the plaintiff to be licensed under the MLA 1951 as suggested by the defendants;

(e) pursuant to the contract, the first defendant had the obligation to make the first payment of RM40,000 on 31 May 2010, the second payment in the sum of RM40,000 was supposed to be paid on 30 June 2010 and another in sum of RM40,000 to be paid by 31 July 2010 (see Item II of Schedule 1 of the first LO, article 9 of the facility agreement and exh MDV11 of encl 11). However the first defendant had delayed in making payment and it was only on 27 July 2010 that the first defendant had paid the plaintiff the amount which was due on 31 May 2010 and 31 June 2010 respectively. The third payment of RM40,000 was only made on 4 August 2010 instead of 31 July 2010 as agreed earlier (see exh MDV11 of encl 33);

(f) the plaintiff had fulfilled its obligations under the contract. The facility agreement stipulated that the plaintiff was not obliged to make payment in event of default on the part of the first defendant. There were instances of default on the part of the first defendant as the first defendant had neglected and/or refused to pay the outstanding amount pursuant to the

contract as stipulated in the first and second LO and all agreements executed between parties as stated herein. As at 31 May 2010 the plaintiff had no obligation to release the facility amount to the first defendant;

(g) as regards the issue of premature action as claimed by the defendant, the plaintiff submitted that under the Limitation Act 1953, the plaintiff was at liberty to commence an action against the defendants within six years from the date of the accrual of the cause of action;

(h) the asset involved in the ASA and the APA was *Islamic General Investment Certificate* which is well within the defendants' full knowledge. The defendants had never disputed this fact. Therefore the defendants were estopped from raising the same here;

(i) there was no element of undue influence on the part of the plaintiff;

(j) the defendants ought to have done a due diligence before entering into the transaction with the plaintiff;

(k) all issues raised were mere afterthoughts. After having benefitted from the said transaction and defendants' action in refuting the claim was not bona fide;

(l) the transaction and all agreements executed for the purpose of the *bai' al-inah* contract as stated above were in compliance with the Shariah principle of financing; and

(m) The defendants had not raised any triable issues and/or a defence on the merits. Therefore the plaintiff was entitled to judgment as prayed in encl 6.

THE LAW

[9] In *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300; [1984] 1 CLJ Rep 283, the Federal Court had clearly laid down the preliminary requirements in an application for summary judgment under the O 14 of the Rules of the High Court 1980 (now the ROC) as follows:

(a) the defendant had entered appearance;

(b) the statement of claim must have been served on the defendant; and

(c) The affidavit in support of the application must comply with the requirements of r 2 of O 14. The application must be supported by an affidavit stating the deponent's belief that there is no defence to the plaintiff's claim.

[10] Once the plaintiff had satisfied the three requirements as set out in the

above quoted case, the plaintiff has established a prima facie case and is entitled to judgment. The burden then shifted to the defendant to show the merits in the defence.

[11] It is trite that where all the issues are clear and the matter in substance can be decided once and for all without having to go through a full blown trial, the matter ought to be resolved and decided in an O 14 application. The court should only exercise the power under the said provision in very clear cases (*Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183; [1987] 2 CLJ Rep 182; [1987] 1 CLJ 246; *Gunung Bayu Sdn Bhd v Syarikat Pembinaan Perlis Sdn Bhd* [1987] 2 MLJ 332; [1987] CLJ 120 (Rep); [1987] 2 CLJ 9.

[12] In *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282; [1980] 1 LNS 168. His Lordship Raja Azlan Shah (CJ), (as His Highness was then) had stated as follows:

> That brings us to the important question whether the Assistant Registrar was entitled to deal with the case under the RSC Order 14 procedure. We have often said in this court many a time that where all the issues are clear and the matter of substance can be decided once and for all without going to trial there is no reason why the Assistant Registrar or the Judge in Chambers, or, for that matter this Court, shall not deal with the whole matter under RSC Order 14 procedure.

[13] In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ Rep 14 ; [1992] 1 CLJ 627; the Supreme Court observed that:

> … the requirement under O 14 for the court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court.

[14] In the same case, the Supreme Court went on to state as follows:

> Apart from identifying the issues of fact and law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

[15] In *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 the Court of Appeal held as follows:

> The underlying philosophy in the O 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where

> there is no reasonable doubt that the plaintiff is entitled to judgment. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases.

(see *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300; [1984] 1 CLJ Rep 283).

FINDINGS OF THIS COURT

[16] It is important to bear in mind that when deciding an application under O 14 of the ROC, the court must look at the whole situation and be satisfied that the defendant has no fair or reasonable probability in having a real or bona fide defence. The court has a duty to peruse and examine all affidavits and documentary exhibits critically before making a decision. In *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312; [1994] 1 CLJ 328 the Supreme Court held:

> It can hardly be emphasised that in order for the court to arrive at a decision that the defence has merits it must perforce make a reasoned assessment of the justice of the case by forming a professional view of the probable outcome of the case, but this is stating the obvious. It involves a mental process that goes through the mind of a Judge when making a decision in any case, weighing the evidence of a litigant against that of another on the facts alleged by a party against those of the other before finally coming to a decision.

[17] With the above principles in mind, I will now examine the documents before me in order to ascertain if the plaintiff was entitled to summary judgment as prayed in encl 6 or whether the defendants had satisfied this court on affidavit evidence that the defence had not only raised an issue but also the said issue is triable. The determination of whether an issue is or is not triable would depend on the facts or the law as disclosed in the affidavit evidence before the court.

[18] Upon a perusal of the plaintiff's own documents as exhibited in the affidavits of Emizura bt Hashim filed herein ('encls 5 and 33') I found that the defendants had managed to raise a triable issue which affect the root of the contract, in that, whether the contract entered into between the plaintiff and the defendants was Shariah compliant. As could be seen in the affidavits filed herein the contract entered into between the plaintiff and the first defendant was premised on the *bai' al-inah* principle. The *bai' al-inah* contract shall consist of two clear and separate contracts termed as the ASA and the APA respectively with no express provision or condition in the contract to repurchase the asset. The ASA and APA must be stand-alone and not tied to one another. Both the ASA and the APA must be concluded at different times which meant that the ASA shall be completely executed before the conclusion

of the APA. There must also be transfer of ownership of the asset and a valid possession of the asset in accordance with the Shariah and current business practice.

[19] Upon perusal of the relevant documents exhibited in the affidavits, I found that the ASA and the APA did not stipulate the subject matter of the transactions. The ASA and the APA made no mention of the subject matter of the transaction and/or to be precise these two agreements did not specify the asset that was transacted by the plaintiff and the first defendant for the purpose of the contract.

[20] Appendix 1 and 2 of ASA (exh MDV5 of encl 5) described the asset in respect of the ASA as *As set out in Letters (s) of Offer (if any)*. A reference to the APA (exh MDV5 of encl 5) disclosed that the description of the word asset had been stated in Appendix 1 and 2 as *As set out in Letters (s) of Offer (if any)*. Now if one were to peruse the letter of offer (exh MDV1 of encl 5) the said first LO and/or the second LO (exh MDV7 of encl 5) made no mention of the asset to be transacted for the purpose of ASA and APA. Under the facility agreement (exh MDV2 of encl 5), s 2.01 stated that *'Asset' means the Shariah-compliant asset more particularly described in the Schedule 1A herein and Assets shall be construed accordingly*. A cross reference to Schedule 1A of the facility agreement disclosed that the *Description of Asset as (As referred to in section 2.01) as set out in the letter (s) of offer (if any)*. Now if one were to look back at s 2.01 of the facility agreement *'Asset' means the Shariah-compliant asset more particularly described in the Schedule 1A herein and Assets shall be construed accordingly*. Appendix 2 to sch 1 of the facility agreement made no description of the 'asset' for the ASA and APA.

[21] The plaintiff's documents as exhibited in the affidavits of Emizura bt Hashim to claim for summary judgment to be entered against the defendants for a substantial sum of RM12,139,615.23 was some kind of a 'treasure hunt' with no treasure to be found. The plaintiff invited the court to move from one document to the other and/or to move in circle with no certainly as to what was the 'asset' that both parties had in mind at the time of the execution of all the relevant documents as mentioned earlier.

[22] Based on the facts which I had narrated above on the affidavits before me, it would appear that there is uncertainty of the asset used in the transaction. None of the documents made reference to a particular asset for the purpose of the ASA and the APA. Certainty is a basic requisite in any contract. What amounts to certainty and/or certain is a question of fact which could not be determined by way of a summary judgment.

[23] In view of the foregoing I was of the view that this was not a fit and

proper case for summary judgment to be entered in favour of the plaintiff.

CONCLUSION

[24] Having considered the pleadings, the affidavits filed herein and the submissions by the respective counsel from both sides and having given the matter a very careful and serious consideration, I am of the view, based on the facts in this case it is not a straightforward and proper case to be disposed of by way of summary judgment under O 14 of the ROC. Accordingly I dismissed encl 6 with cost of RM5,000 to be paid by the plaintiff to the defendants. This matter was sent back to the learned deputy registrar for case management and trial dates to be fixed.

Plaintiff's application dismissed with costs of RM5,000.

Reported by Ashgar Ali Ali Mohamad